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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,
Petitioner,

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS and the CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN, INC. INTERVENOR-RESPONDENT

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Questions Presented

I. Does application to newspapers of a prohibition against sex-segregated want ads violate the First Amendment?

(Answered in the negative by the court below.)

II. Was petitioner denied due process of law by the commission order prohibiting the use of sex-segregated want ad columns?

(Answered in the negative by the court below.)

Statement of the Case

Respondent, The National Organization for Women, Inc., adopts in full the Statement of the Case set forth in the Brief filed by Respondents, The Pittsburgh Commission on Human Relations and the City of Pittsburgh.

Summary of Argument

I.

Free access by women to the employment market is required by the Equal Protection Clause of the Fourteenth Amendment. Exercise of the police power is appropriate to this end in order to break the cycle of poverty and second-class citizenship in which women have been trapped.

The inclusion of a prohibition against discrimination by reason of sex in Pittsburgh's Human Relations ordinance was reasonable in terms of the strong public policy of the Commonwealth of Pennsylvania in favor of equal rights for women. The prohibition of job advertising which discriminates against women does not infringe upon Petitioner's First Amendment rights, since the want-ad section of the newspaper is a commercial operation which can properly be regulated under statutes of general applicability serving a public interest.

The burden placed upon the Press by the order appealed from is incidental, since Petitioner's editorial views can readily be expressed in other sections of the newspaper.

Regulations pertaining to the commercial aspects of the newspaper business have been sustained by this Court in a long line of decisions commencing with *Valentine v. Chrestensen*, 316 U. S. 52 (1942). Moreover, the *manner* in which First Amendment rights are exercised is not beyond regulation, particularly where, as here, the regulation is in furtherance of women's right to equal protection.

II.

The changing role of women in the labor force is evidenced by data from the 1970 census, which demonstrates that while women constitute 37% of the employed population most of them are in lower-paying jobs. The connection between this fact and discrimination against women in employment has been generally recognized, as has the discriminatory effect of sex-segregated want ad advertising.

Petitioner has not been denied due process by the order appealed from, since the prohibition of want ad sex-segregated column heads bears a reasonable relationship to an evil which the City of Pittsburgh sought to remedy in furtherance of the equal protection of the rights of women.

ARGUMENT

I. Application to newspapers of a prohibition against sex-segregated want ads does not violate the First Amendment.

The National Organization of Women, Inc. (NOW) filed its complaint with the City of Pittsburgh Human Relations Commission in the belief that free access by women to the employment market is of crucial importance if women are to reach the status of equality mandated by the Equal Protection Clause of the Fourteenth Amendment. This is not a case about sex-segregated washrooms. Rather, it is

a case about equal employment opportunity for women, and the exercise of police power to break the cycle of second-class citizenship and poverty in which they have been trapped by the traditional community roles assigned to them in a male-dominated society.

The problem of discrimination in employment is one of significant scope. The ordinance here involved, adopted in 1967 by the Council of the City of Pittsburgh, prohibited discrimination in employment, housing, public accommodations and other areas of inter-group relations by reason of race, color, religion, ancestry, national origin or place of birth. The ordinance was amended in 1969 to include discrimination on the basis of sex. A legislative finding of the existence of sex discrimination and a declaration of the City's public policy against discrimination on the basis of sex supported the amendment (Pet. App. 105-108).

The Pittsburgh ordinance, in section 8(e), expressly prohibits employers from advertising job opportunities in a manner which indicates "any preference, limitation, specification or discrimination" based on sex (Pet. App. 8). The ordinance also contains, in section 8(j), a prohibition against any person (defined in the ordinance to include corporations) from aiding or participating in such discrimination (Pet. App. 94a). The Commission held that the publication of want ads segregated by sex was a violation of the latter subsection and this holding was sustained by the Pennsylvania courts.

Petitioner argued before the Commission and the Pennsylvania courts that the headings "Male Interest" and "Female Interest" simply reflected the preference of men and women for certain types of jobs, and that the column headings represented the paper's editorial judgment that the

best interests of both advertisers and readers are served by an arrangement enabling both sexes to locate easily the possible jobs in which they might be interested.

Throughout these proceedings, Petitioner has not challenged the constitutionality of the ordinance on its face but simply its constitutionality as applied to the Pittsburgh Press. The issue here, therefore, is whether a newspaper may be enjoined from publishing want ads classified in sex-segregated columns, as against Petitioner's claim that its First Amendment rights are violated thereby.

The Commonwealth Court, in denying First Amendment protection to sex-segregated want-ad columns, noted that both Petitioner and the American Newspaper Publishers Association, *Amicus*, agreed that in the absence of an exemption, the Press could not utilize column headings such as "Jobs-Black Interest" or "Jobs-Catholic Interest", etc. (Pet. App. 60). They thus conceded the discriminatory character of the labelling insofar as race and religion are concerned. The courts below held that "Male Interest" and "Female Interest" were equally objectionable.

What Petitioner seems to be saying is that the Ordinance is constitutional, employers cannot discriminate in the text of their ads on the basis of sex, and column headings tending to exclude other categories of persons protected by the Ordinance are discriminatory and hence illegal, but such headings are *not* discriminatory when applied to women.

Under the Pittsburgh Ordinance and comparable provisions in the Pennsylvania Human Relations Act, 43 P. S. 955 (b)(2), an employer is expressly prohibited from advertising for a male or female employe unless he has first been given an exemption based upon a finding that

sex is a bona fide occupational qualification (BFOQ) for the job advertised. The Pittsburgh Ordinance in Section 7(d) provides specifically for the issuance of exemption certificates, but as of the time of the Commission hearings in this case no exemption on sex grounds had been applied for by any employer (Pet. App. 15). Thus, no advertiser could legally, at the time of the Commissioner's order, place an employment ad indicating a preference as to sex.

Petitioner's use of the column headings "Male Interest" and "Female Interest" thus affords employers an opportunity to do indirectly what they are not permitted to do directly—indicate whether they wish to hire a man or a woman. Testimony at the Commission hearing made this clear. Called as for cross-examination, Petitioner's Classified Ad Manager, Robert Seli, testified that prospective advertisers were asked under which of the three available categories the ad should appear: "Male Interest", "Female Interest", "Male-Female". If the advertiser was uncertain, he was asked whether he was looking for a man or a woman. In each case, Mr. Seli testified, there was an expression of preference by the advertiser (A. 125-126).

Thus, the employer preference for one sex or the other could be expressed just as clearly through column headings designated male or female "interest" as could ads under headings "Black Interest" or "Catholic Interest". The indication that this is recognized by prospective employers who use Petitioner's want ad columns is indicated by the column space of ads appearing under the various headings. Testimony at the hearing established that the "Male Interest" section has about 1,600 column inches, the "Female Interest" about 400, and the "Male-Female" about 100 column inches (A. 33). Accordingly, if Petitioner is correct in its assumption that its readers are interested in

only certain kinds of jobs women will read less than a fourth of the column inches of job opportunities.

It is this kind of job channeling, at the employer's request, which Petitioner is here asserting its right to continue. Its claim for First Amendment protection, based upon its position that want ad hearings represent social commentary which is entitled to the same protection as its editorial page and its news columns, is, to use Mr. Justice Harlan's phrase in another context, "little short of fanciful".[1]

There is no necessity for NOW to burden this Court with a full review of the cases involving First Amendment rights as applied to commercial advertising. This has been done comprehensively in the brief for the other Respondent, the Pittsburgh Human Relations Commission and the City of Pittsburgh; NOW is in complete agreement with the position taken therein. A response to certain of the arguments made to Petitioner may, however, be in order.

Petitioner has cited *Branzburg v. Hayes*, 92 S. Ct. 2646 (1972), a case involving newsmen's constitutional privilege from giving grand jury testimony. The use of this case as authority supportive of its claim is inapposite. Mr. Justice White, speaking for the majority and reviewing the present status of the law reiterated this Court's rule that a newspaper has no special immunity from the application of general laws, citing *Associated Press v. NLRB*, 301 U. S. 132-133 (1937), and holding as follows:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal stat-

[1] *Oregon v. Mitchell*, 400 U. S. 112, 212 (Concurring and dissenting opinion).

utes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

In the instant case, the Ordinance in question is of general applicability and serves a substantial public interest. At most, if the Court sustains the decision appealed from, the Press will have only the incidental burden of being required to change the headings of its want ad columns. It will still be free to express its editorial view that the "existing *de facto* division of employment between males and females" affords proper basis for classifying its want ads, since the division will *"generally* reflect job interest and qualifications along sex lines." (Pet. Brief 26-27). The difference will be that this opinion will have to be expressed on its editorial page, or possibly in its news coverage, not in its Classified Ads.

This "incidental burden" must be balanced, as Petitioner concedes, against the substantial public interest represented by Pennsylvania's policy against discrimination on the basis of sex. In July, 1969, the Pennsylvania Human Relations Act was amended to add "sex" to the statute which, since 1955, had prohibited discrimination on the basis of race, color, religious creed, ancestry, age and national origin. The Ordinance here in question was passed the same month.

The following year the Pennsylvania legislature passed for the second time a proposed amendment to Article 1 of the Pennsylvania Constitution, which was submitted to the voters at the election held May 18, 1971. It provided: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual". The voters of Pennsylvania

approved the Amendment. While the Amendment has no direct effect upon this litigation, it is of significance in determining the issue of whether the state interest is, in fact, a substantial one.[2]

It was with this history of support for equal rights for women in mind that the Commonwealth Court wrote that want-ad column heads should be asexual, because this would represent "the highest degree of societal commitment to the ideal of sexual equality" (Pet. App. 61). Contrary to Petitioner's argument (Pet. Brief 21), headings which have the effect of indicating that the jobs listed are available only to men (or women) clearly aid in discrimination. Particularly this is so when the headings here involved replaced the captions used prior to October, 1969, "Male Help Wanted" and "Female Help Wanted". Moreover, an intent to discriminate would seem to be irrelevant. Chief Justice Burger noted in *Griggs v. Duke Power Co.*, 401 U. S. 424, 432 (1971), that the federal Civil Rights Act of 1964 was directed "to the *consequences* of employment practices, not simply the motivation".

Petitioner's attempt to distinguish this case from *United States v. Hunter*, 459 F. 2d 205 (4th Cir.) *cert. denied* 93 S. Ct. 235 (1972) must fail. There the constitutionality of a state statute prohibiting discriminatory housing advertisements was sustained against the newspaper publisher's claim to First Amendment rights. The Court of Appeals relied on the long line of authority commencing with *Valentine v. Chrestensen*, 316 U. S. 52 (1942), sustaining regulation of the commercial aspects of the newspaper business, and held that an ad containing suspect racial designations in violation of the statute communicated an

[2] Pennsylvania has also ratified the proposed federal Equal Rights Amendment.

intent which the publisher could readily "divine". The choice of the word may have been unfortunate, but clearly in the instant case no divining is necessary, the determination of whether an ad is illegal—is there a BFOQ—is clear-cut. Petitioner need not screen the ads, although presently it does, to ascertain in which sex-designated column to place them.

Petitioner is correct in saying that the objection in this case was not to the ads themselves, as in *Hunter*, but to the "use of gender designated column headings" (Pet. Brief 20). But where, as here, the testimony establishes that the choice of the heading reflected the preference of the advertiser, and that the effect was discriminatory, the courts below properly concluded that Petitioner was actively aiding and participating in discriminatory advertising, which was specifically prohibited by the Ordinance.

The constitutionality of other federal statutes prohibiting discriminatory advertising has been sustained against First Amendment contentions: *Capital Broadcasting Co. v. Acting Attorney General*, 405 U. S. 1000 (1972), aff'g 333 F. Supp. 582 (D. C. 1971) (prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC); *New York State Broadcasters Association v. United States*, 414 F. 2d 990 (2d Cir. 1969), *cert. denied* 396 U. S. 1061 (1970) (prohibiting the broadcasting of lottery information).

Petitioner also asserts that "the Press is now being subjected to a more stringent test than in the area of obscenity" and being required to "prove empirically the truth of its opinion before it can be published" (Pet. Brief 18-19). The reference to Mr. Justice Brennan's discussion in *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965), if intended

to support either proposition, is misleading. As the article points out, all schools of thought as to the scope of the First Amendment are in agreement that "though the speech itself be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment."

Respondents herein fully support Petitioner's First Amendment right to express its views on women's role in the employment market as determined by its conception of their interests. The opinion, whether true or false, simply should not be set forth in its want ad column headings, but on the editorial page or in the way in which it covers and prints the news. The *manner* in which Petitioner's First Amendment rights are exercised is not beyond regulation, particularly where, as here, the commercial regulation is in furtherance of women's constitutional right to equal protection in the field of employment opportunity.

II. Petitioner was not denied due process of law by the Commission order prohibiting the use of sex-segregated want ad columns.

Implicit in this case is the reluctance of Petitioner to accept the implications of the changing status of women in the field of employment which has occurred during the last decade. It is undoubtedly true that "most secretaries and nurses are women" (Pet. Brief, 26). It is also true that, of the 11.9 million jobs added to the labor force between 1960 and 1970, 65.3% were filled by women.[8] Their share of the increase was not confined to those jobs traditionally held by women. For example, 51.5% of the new laborers' jobs went to women, and women accounted for 28.6% of the

[8] All of the data contained in this paragraph is from a recently issued publication, *Occupation by Industry*, Census Bureau, Government Printing Office.

increase in managers' jobs. The 1970 census also reflected a sharp decline in private household workers, a field traditionally occupied almost exclusively by women, showing a net decrease of 570,236 workers. Overall, the census showed that 37.8% of all employed workers are women.

The changing character of the labor force points up the necessity for the law to reflect the new image of women. Forty-four (44%) per cent of all adult women now work outside the home, while the percentage of the total population who are females has climbed to over 52%. The extent to which women now participate in the labor market makes fair access to employment opportunities a matter of crucial importance.

It is, of course, true that an exceptional and strongly motivated woman will "buck the system" and move into fields where few have ventured before. But most women have been conditioned to accept the kind of job assigned to them by the society in which they live. It is only in the last few years that women have begun to escape the stereotypes common in the culture.

There once was a time when Negroes were thus "kept in their place" and, indeed, the residual remains of the segregation system still survive. Women, too, have been treated in many respects as second-class citizens, and nowhere is this more evident today than in the field of employment. The jobs women hold are typically the lower-paying ones. In 1970, 75.2% of employed women who were heads of households made under $7,000 a year as compared to only 29.1% of the men; 61.4% of the women earned less than $5,000, while only 17.8% of the men were paid less than $5,000. Twenty-one and nine-tenths (21.9%) per cent of all households headed by an employed person are headed by women.[4]

[4] Guide to Consumer Markets—1972/73, The Conference Board, Department of Commerce.

At the hearings before the Commission on Human Relations evidence was offered to substantiate the extent of the discrimination against women in employment, including a series of charts prepared by Catherine East, Executive Secretary of the President's Committee on the Status of Women (A. 357-374). Mrs. East and Mrs. Elizabeth Koontz, former President of the National Education Association and presently Director of the Women's Bureau, Department of Labor, both testified to the federal policy against sex discrimination in advertising (A. 139-141).

Testimony at the Commission hearing also established that the column headings used by the press tended to discourage women from even considering applying for the jobs advertised under the "male interest" heading. Dr. Sandra Bem, a professor and research scientist in psychology at Carnegie-Mellon University specializing in sex roles and sex differences, testified as to a test administered to fifty-two Carnegie-Mellon female students. Half of the women were given a booklet containing sixteen want ads from the Sunday Pittsburgh Press arranged under the column headings and with the usual "disclaimer" by the Press. The other half received booklets in which the same ads appeared in alphabetical order, with no sex labelling. All of the women were asked to rate *all* of the jobs to indicate their degree of interest, the rating to be made on the assumption that she had the necessary prerequisites for all of the jobs (A. 236-239).

The study showed that when the ads were sex-segregated as in the Press, only forty-six (46%) per cent of the women were as likely to apply for "Male Interest" jobs as for "Female Interest" jobs. But when the same jobs appeared in an integrated alphabetical listing with no reference to

sex, 81% of the women prefered the "Male Interest" to the "Female Interest" jobs. For example, the job of newspaper reporter fell in popularity from seventh most popular when it appeared in the integrated listing to nineteenth place when it was segregated and labelled as a "Male Interest" job.[8]

The experiment conducted by Dr. Bem thus reinforced the testimony of federal officials that discriminatory advertising places limitations upon the interest of women in seeking jobs outside the areas in which women typically have been employed. It showed also that the Press' "disclaimer" does not undo the damage done by the sex-segregated column headings.

In a similar type of case, involving sex discrimination against males, the Fifth Circuit commented as follows in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.'"

It can hardly be denied that limitations upon free access to the employment market present an equal protection problem of considerable significance. Legislative bodies therefore had not only a right, but a duty under the equal protection clause to address themselves to the problem. The Commission and the courts below properly concluded, on the basis of the comprehensive evidence offered at the hearing, that allegedly "separate but equal" sex-designated

[8] The results of the tests were evaluated and found to be statistically significant at the .021 level of confidence by a chi-square test. (A. 239)

want-ad columns were in fact inherently unequal and thus should be prohibited. Compare *Brown v. Board of Education*, 347 U. S. 483 (1954); *Bolling v. Sharpe*, 347 U. S. 497 (1954).

Petitioner has argued that its want ad headings represent "a workable classification system" resulting from "the existing *de facto* division of employment between males and females" (Pet. Brief 26-27). NOW agrees with this proposition—that is exactly what the classification system is all about. But the primary purpose of civil rights legislation was to change the system of discrimination as to men and women. As stated in *Rosenfeld v. Southern Pacific Company*, 444 F. 2d 1219, 1225 (9th Cir. 1971):

> "The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on an equal footing with men."

The Press' classification system defeats this purpose. The legislative intent is to free all persons from the chains of the past, whether forged by the bonds of slavery or fabricated by a society which treats women as the inferior sex.

That women as a group are no longer to be automatically disqualified on the basis of sex was recognized by this Court as recently as last term in *Reed v. Reed*, 404 U. S. 71 (1971). Therein, a unanimous Court invalidated a manatory provision of the Idaho probate court which required a man to be preferred over a women as administrator of the estate of a decedent in the same entitlement class. This Court found that a difference in treatment of persons in the same class solely on the basis of sex and without regard to the qualifications of the individual was a violation of the Equal Protection Clause.

The status of being unemployed is neutral and common to both men and women. In obtaining a job one sex should not be preferred over the other and want-ad classifications which suggest such preferences are contrary to law. As in *Reed v. Reed, supra* the wisdom of the legislation is not before this Court.

Respondent, NOW, submits that the Commission order, as affirmed by the courts below, is well within the scope of the ordinance and implements a public purpose under the Equal Protection Clause. It should therefore be affirmed.

Conclusion

For all of the aforesaid reasons, Intervenor-Respondent NOW respectfully requests that the Order of the Commonwealth Court be affirmed.

Respectfully submitted,

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